MARKA INDUSTRIAL SDN. BHD.

v.

ELGI MARKA SDN. BHD. (IN RECEIVERSHIP)

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[DISTRESS SUIT NO. 48-4-87]
20 SEPTEMBER 1988

LANDLORD AND TENANT: *Distress - Receiver and Manager of respondent applied for order that goods seized under distress be released from seizure - Whether there was a valid tenancy agreement between the applicant and respondent - Whether distress action an attempt to frustrate the actions of the Receiver who was validly appointed.*

The applicant had obtained a writ of distress against the respondent for recovery of rent due in respect of a factory situated on land held under HS [D] KA 1110/74, P.T. No. 69392 Mukim of Ulu Kinta amounting to RM720,000 being arrears of rent from December 1986 to November 1987. The respondent then applied through its receiver and manager for the distrained goods to be released.

The receiver and manager alleged that the landlord and tenant relationship between the applicant and the respondent was false on the basis that there was no tenancy between the applicant and respondent.

The applicant raised the preliminary objection that the appointment of the receiver and manager was not valid and as such there should be no objection to the distress action.

Held:

[1] Having considered the arguments, affidavits and authorities there were merits in the receiver and manager's arguments and there was an inescapable conclusion that there was actually no tenancy agreement between the applicant and the respondent and the distress action was an attempt to frustrate the actions of the receiver and manager when negotiations between them failed.

[2] However on the preliminary objection by the applicant it was found on the facts that the receiver and manager had not been properly and validly appointed in all the circumstances.

Application by receiver and manager dismissed with costs in the cause.

[Interim stay granted pending appeal subject to the applicant applying to set aside the order for a stay.]

For the applicant - M.S. Murthi; M/s. Murthi & Partners
For the receiver & manager of the respondent - N.T. Rajah; M/s. Maxwell Kenion Cowdy & Jones

JUDGMENT

Abdul Malek Ahmad J:

Vide originating summons 31-1596-87 which was applied for *ex parte*, the applicant had obtained an order upon a certificate of urgency before the learned Senior Assistant Registrar on 5 December 1987 for a writ of distress against the respondent for recovery of rent due in respect of the factory situated on land held under HS [D] KA 1110/74, P.T. No. 69392 Mukim

of Ulu Kinta amounting to RM720,000 being arrears for December 1986 to November 1987 at RM60,000 a month and for the Court bailiff to enter the said factory to take possession of all the moveable goods therein.

By this summons-in-chambers filed on 14 December 1987 at encl. 9 of this distress suit, the respondent through its receiver and manager had applied for an order that the goods seized on 7 December 1987 under the writ of distress be released from seizure, that the costs of the application be borne by the applicant, such other relief as the Court deemed fit and that all proceedings be stayed pending the hearing of the application. After a number of postponements, the matter finally came up for hearing on 5 April 1988 when the learned Counsel for the applicant raised a preliminary objection as regards the validity of the appointment of the receiver and manager of the respondent. To avoid further postponements, arguments for both the preliminary point and main application were heard together and I propose to deal with the main application first.

Counsel for the receiver and manager for the respondent had submitted that the main issue was the alleged landlord and tenant relationship between the applicant and respondent and this was false for the following reasons:

[a] that the receiver and manager had been in possession of the premises since 1 December 1986 after the respondent had failed to pay the loan and credit facility from Bank Pembangunan which were secured by charges and debentures and that the distress was only on 8 December 1987 - at no time intervening had there been any allegation of tenancy between the parties;

[b] that there had been no demands from the applicant or letters sent by the respondent or receiver and manager as regards the rental;

[c] that there were no records of the respondent ever paying rent;

[d] that *vide* SJ4 of encl. 4 dated 18 August 1987 between Bank Pembangunan and the director of the respondent as regards the negotiation for plant and machinery there was no reference as to the rental - it was the result of the failure of these negotiations that the distress took place;

[e] that the alleged rental was stated to be RM60,000 per month - learned Counsel for the receiver and manager for the respondent argued that the one year arrears amounting to RM720,000 were only for the purpose of trying to recover the value of the factory which they could not buy over;

[f] that the original of the alleged tenancy agreement was never produced. Learned Counsel for the receiver and manager for the respondent argued that the printed "6" for the year of agreement was written and not stamped over the stamp from the photostat copy produced and there had been no explanation from the applicant either by affidavit or submissions as to where the stamping took place; and

[g] that the applicant and respondent were associated companies and that the 2 directors for both were the same. In particular, Issac Alexander Lamach had affirmed the affidavit at encl. 1 of originating summons 31-1596-87 as senior manager of the applicant whereas SJ6A, SJ6B, SJ6C, SJ6D, SJ6E, SJ6F, SJ7A and SJ7B and three other unmarked exhibits at encl. 24 all bear the signatures or references to Mr. Lamach as managing director or representative of the respondent.

Learned Counsel for the applicant replied that since the application for distress was on 4 December 1987 and the failure of negotiations was on 7 December 1987 the latter could not have been the cause for the former. Even the managing director of the respondent had admitted by encl. 27, he said, that there was an agreement between the parties and had explained how the agreement got lost and it was not open for the receiver and manager to question this fact as it had taken place before his appointment. In any case, Counsel argued that it was the fact of the tenancy and not the document itself that was important.

He further went on to say that a receiver and manager cannot come to Court and displace the right of the landlord as in the present case where it is neither the respondent's or bank's property but the applicant's property which was occupied by the receiver and manager from 1 December 1986 without paying rent.

Having considered the arguments, affidavits and authorities, I was of the view that there was merit in the Counsel for the receiver and manager of the respondent's arguments. According to the managing director of the respondent, he had the original of the tenancy agreement which was executed in April 1986, but on the day the receiver and manager came to his office, he was away and his office and cabinet was broken into and most of the documents removed by the receiver and manager's staff. This piece of unsubstantiated averment has to be assessed in the light that neither the managing director of the respondent nor the applicant had furnished details of the stamping of the agreement as regards the date and place; that a close scrutiny of the stamp marks clearly indicate that, as learned Counsel for the receiver and manager of the respondent had pointed out, that the "6" in the second stamp mark is not printed but written; that the applicant and respondent were associated companies; that although the alleged agreement is from 1 April 1986 to 31 March 1987 and the senior manager of the applicant had in his affidavit at encl. 1 of Originating Summons 31-1596-87 stated that arrears were from June 1986, no receipts were produced for April and May 1986, and surprisingly enough the first prayer in that originating summons had claimed for arrears from December 1986 to November 1987; that no demands for rental were ever made and that no mention of the tenancy was made in all the correspondence produced as exhibits to the affidavits considering that the rental was as high as RM60,000 a month; and that if it was true that the arrears were from June 1986 there had been undue delay of 18 months in filing the writ of distress.

Taking all these factors into consideration, I came to the inescapable conclusion that there was actually no tenancy agreement between the parties and that this was an attempt by the applicant to frustrate the actions of the receiver and manager about one year after his appointment as the applicant had no other remedy in view of the failure in negotiations between the parties. I would therefore had allowed the application by the receiver and manager of the respondent if not for the preliminary objection of the applicant with regard to the validity of the appointment of receiver and manager.

As stated in the deed of debenture between Bank Pembangunan and the respondent at para. 10.02 of SJ5 of encl. 21, the appointment of receiver and manager is to be made by the Executive Director of Bank Pembangunan. A search at the Registry of Companies by Counsel for the applicant as per his affidavit at encl. 21 yielded two notices of appointment of the same receiver and manager by the respondent. The first [MSM-1] dated 15 March 1986 was signed by the executive director of Bank Pembangunan but the one dated 1 December 1986 [MSM-2] was signed by the chief executive. The deed of appointment at SJ1 of encl. 8 is also signed by the said chief executive and not the executive director.

Learned Counsel for the receiver and manager of the respondent had argued that no objection had been made over the one year the receiver and manager had been in possession and in any case the same receiver and manager had been appointed as such by the United Asian Bank on 16 December 1986. He also submitted that the appointer should be the only party to raise any objection. To that, learned Counsel for the applicant had referred to MSM-1 and MSM-2 of encl. 43 which were the appointments of the two attorneys for United Asian Bank which appointments did not include the power to appoint a receiver and manager as had been done *vide* SJ11 of encl. 24. As such, he reiterated that even the appointment of the same receiver and manager by the United Asian Bank was *void ab initio.* Learned Counsel for the applicant also referred to encl. 14, which is still pending, where bank pembangunan themselves had applied for the release of the same goods under distress. With the actual debenture holder making the claim, Counsel submitted that the receiver and manager as agent of the debenture holder cannot also claim. This, he added, demolishes Counsel for the receiver and manager for the respondent's claim that only the appointer can object to the appointment of the receiver and manager. He further stated that the fact that Bank Pembangunan themselves are making the claim after the purported appointment of the receiver and manager indicates that they themselves were seriously doubting the said appointment.

On these considerations, I accepted the contention that the receiver and manager had not been properly appointed in the circumstances. The application by the receiver and manager of the respondent was therefore dismissed with costs in the cause and because of the lengthy arguments I refused the application by Counsel for the receiver and manager of the respondent to adjourn to open Court for further arguments but granted an interim stay pending the appeal subject to the applicant applying to set aside the order for the stay.

Also found at [1988] 2 CLJ 788